No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, individually; and as an heir, devisee and legatee of Olof Zetterlund, deceased, suing on his own behalf and on behalf of all other heirs, devisees and legatees of Olof Zetterlund, deceased, similarly situated; etc.,

Appellant, Plaintiff and Cross-Defendant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, both individually, and as pretending co-executors, or co-executors *de son tort,* of the estate of Olof Zetterlund, deceased,

Appellees, Defendants and Cross-Complainants.

DORA MILLER and HAROLD M. DAVIDSON, co-executors of the Estate of Olof Zetterlund, deceased,

Cross-Complainants and Complainants in Interpleader,

vs.

STATE OF CALIFORNIA, and THOMAS H. KUCHEL, as Controller of the State of California,

Defendants in Interpleader.

BRIEF OF APPELLEE, DORA MILLER.

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BRIEF OF APPELLEE, DORA MILLER.

I.

Jurisdiction.

The appellee, Dora Miller, is an adult resident and citizen of the State of California and a Co-Executor of the Estate of Olof Zetterlund, Deceased, by order of the Probate Court of the State of California, and Harold M. Davidson, appellee, is an adult citizen of the State of New

Jersey and a Co-Executor of the Estate of Olof Zetterlund, Deceased, by order of the Probate Court of the State of Florida. The amount in the alleged controversy is in excess of $3,000.00, exclusive of interest and costs.

In the alleged controversy proceedings, appellant requests that full faith and credit be given to the judgment rendered by the Constitutional Courts of the State of Florida in accordance with Section 1, Article IV of the Constitution of the United States of America.

Preliminary Statement.

This appellee, Dora Miller, appeared and petitioned the courts of Florida as legatee under the last will and testament of Olof Zetterlund and as Co-Executor under the codicil of such last will and testament. In so appearing, appellee attempted to institute ancillary probate administration in that state. As a prelude to such proceedings, appellee did seek, as it was necessary so to do, revocation of the domiciliary probate proceedings theretofore commenced in said state, but which proceedings had been commenced subsequent to domiciliary proceedings in the State of California. Appellee in said petition did represent to the Florida Court that the codicil with a copy of the will attached was filed for probate in the Superior Court of the State of California in and for the County of Los Angeles on August 31, 1945, and that the same was admitted to probate by such court on September 28, 1945. The filing of said petition and the procedure adopted and followed by said appellee was calculated to carry out an orderly system of administration of the estate of decedent wherever assets were located. Appellee

recognized that ancillary probate administration may be had in any state in which decedent left property. The State of Florida, through the judgment of the County Judge's Court in and for Dade County, State of Florida, dated December 31, 1946, rejected such orderly proceeding. Instead, said Court did enter on February 26, 1947, its order commanding appellee to deliver all intangible personal property in her possession owned by Olof Zetterlund at the time of his death, knowing full well appellee was serving as Co-Executor in the California proceeding and holding property in such capacity. Appellant now seeks to compel enforcement of this judgment under the full faith and credit clause of the United States Constitution, and to thereby give extraterritorial effect to probate proceedings of the State of Florida.

Issues.

(1) Does the United States District Court in and for the Southern District of California have jurisdiction to declare that the judgment dated February 26, 1947, entered by the Court of the State of Florida is entitled to full faith and credit;

(2) Even assuming such District Court has jurisdiction, shall such Court declare that full faith and credit be given; or,

(3) May such District Court in the exercise of its discretionary authority decline such recognition; and

(4) Does Appellant, either individually or as purported class representative, have proper legal capacity to seek such recognition in such District Court?

Facts.

Olof Zetterlund died in Los Angeles County, in the State of California, on August 21, 1945, having resided in such state continually since the Fall of 1941.

On August 31, 1945, domiciliary administration was commenced in the Superior Court in and for the County of Los Angeles, State of California, and an order was entered by said Court on September 28, 1945, admitting the Codicil to the Last Will and Testament of said Olof Zetterlund, deceased, dated August 3, 1945, and granting Letters Testamentary appointing Dora Miller and Harold M. Davidson, the appellees, as Co-Executors.

On September 6, 1945, domiciliary proceedings were commenced in the County Justice Court in and for Dade County, in the State of Florida, and on such date the Last Will and Testament of Olof Zetterlund, dated June 9, 1937, was admitted to probate and, thereafter, Samuel Nelson, the appellant, was named as Executor of the Estate.

On October 2, 1945, Dora Miller, as legatee and Co-Executor under the Codicil above-named, and appellee, Harold M. Davidson, as Co-Executor under the Codicil above-named, filed a petition in the County Judge's Court in and for Dade County, in the State of Florida, setting forth that Olof Zetterlund was a resident of the City of San Gabriel, County of Los Angeles, State of California, at the time of his death on August 21, 1945, and for some time prior thereto and was not a resident of the State of Florida at the time of his death and that on the third day of August, 1945, decedent did make, declare, and publish a Codicil to his original Will dated June 9, 1937, in and by which Codicil he declared himself to be a resi-

dent of the County of Los Angeles, State of California. Appellee as one of the petitioners in the Florida proceeding did pray:

> (1) That the order admitting the Instrument alleged to be the Last Will and Testament of Olof Zetterlund, deceased, entered September 6, 1945, by said Court, be revoked;
>
> (2) That the County Court of Dade County, State of Florida, declare Olof Zetterlund to be a resident of Los Angeles County, State of California, at the time of his death;
>
> (3) That the said Florida Court admit a Codicil to the Last Will and Testament of Olof Zetterlund, deceased, for probate and ancillary proceedings in the said Court of the State of Florida (an exemplified copy of the Codicil to the Last Will and Testament was annexed thereto);
>
> (4) That appellees be appointed Ancillary Executors of the Last Will and Testament, and the Codicil thereof, of said Olof Zetterlund, deceased, and in the alternative, that if the said Court found appellees disqualified, that it appoint some suitable person as Ancillary Executor of the exemplified copy of the Codicil with the Will annexed of the said Olof Zetterlund, deceased.

On January 24, 1946, the State of California by and through its Controller, Harry B. Riley, filed its petition for revocation of the Florida probate and for ancillary probate of the Will of Olof Zetterlund, deceased, in the State of Florida.

On September 31, 1946, Judge Blanton, County Judge, County Judge's Court in and for Dade County, State of Florida, made and entered his judgment, order and decree, finding that the said Olof Zetterlund, deceased, was at the time of his death, to-wit: the twenty-first day of August, 1945, a resident and citizen of the State of Florida and County of Dade, and that his said Last Will and Testament was rightfully and lawfully admitted to probate in Dade County, Florida, on September 6, 1945, and that the probate proceedings in said Court continue and proceed as an original and domiciliary administration.

On December 31, 1946, the Probate Court of the State of Florida made an order denying the petitions of the State of California and of Dora Miller and Harold M. Davidson.

On January 17, 1947, the Probate Court of the State of Florida made and entered an order appointing Samuel Nelson as the sole executor of the Last Will and Testament of Olof Zetterlund, deceased. Samuel Nelson thereafter duly qualified as such executor.

Dora Miller, Harold M. Davidson and the State of California appealed from the order of said Probate Court to the Circuit Court of Dade County, Florida.

On February 19, 1947, Samuel Nelson, as executor, filed a petition with the Probate Court of Florida, demanding that Dora Miller and Harold M. Davidson deliver certain assets then in their possession. A hearing

was had and on February 26, 1947, the Honorable W. F. Blanton, County Judge of the County Judge's Court in and for Dade County, State of Florida, made and entered an order requiring Dora Miller and Harold M. Davidson to deliver intangible personal property in their possession owned by Olof Zetterlund, now deceased, at the time of his death.

The appellees appealed from the judgment and order of the County Judge's Court to the Circuit Court for the Eleventh Judicial Circuit, in and for the County of Dade, State of Florida. The said Circuit Court affirmed the judgment of the lower court. Thereupon appellees appealed from the Circuit Court to the Supreme Court of Florida. The Supreme Court of the State of Florida affirmed the judgment of the lower court on April 30, 1948 *Dora Miller et al v. Nelson,* 160 Fla. 410, 35 So. 2d 288).

The appellant thereafter filed this suit in the United States District Court in and for the Southern District of California in an attempt to compel compliance with the judgment entered in the State of Florida on February 26, 1947, and to declare that the appellees be adjudged in contempt of court for their refusal and failure to comply with the terms and provisions of said judgment. Appellant included in its complaint four separate and distinct causes of action.

On March 3, 1949, appellees as Co-Executors of the estate of Olof Zetterlund in the probate proceedings

brought in the Superior Court, of the County of Los Angeles in and for the State of California, filed a cross-complaint for Interpleader and Declaratory relief. They prayed that the District Court adjudge and determine who are the proper representatives of the above estate, and adjudge and determine whether the State of California is entitled to inheritance tax from the estate. Appellees attached as exhibits to said cross-complaint exemplified copies of all of the orders and petitions of the Probate Court of the California Superior Court admitting to probate the Last Will and Testament of Olof Zetterlund and the Codicil thereto.

The case was submitted to the Court for decision, based upon certain facts admitted by the parties in the matter and with the request that the Court determine whether or not it could render a judgment based upon the admitted facts, before taking any evidence beyond the question of whether or not the Federal Court could adjudicate the rights or responsibilities of the two sets of executors, one appointed in the Probate Court of the State of Florida and one appointed by the Probate Court of the State of California.

On July 3, 1951, Judge Harry C. Westover entered a judgment for the appellees on the first, third and fourth causes of action of the original complaint and noted in said judgment that the second cause of action had been dismissed upon motion of appellant made in open Court. From this appellant now appeals.

Summary of Argument.

A. No "case" or "controversy" is presented as required by Article III of the United States Constitution and therefore the District Court lacks jurisdiction.

B. Even assuming the District Court has jurisdiction, which appellee contends it does not, said Court can properly decline to exercise jurisdictional power and choose not to interfere with the local probate affairs of the respective states of Florida and California.

C. The relief prayed for by appellant for the compulsory recognition of a Florida judgment would be improper and would be in derogation of the sovereignty of the State of California and the Probate Courts thereof, and would preclude such Courts from effectively carrying out the orderly probate administration within the State of California.

D. Appellant is improperly making a collateral attack upon the judgment of the Superior Court in and for the County of Los Angeles, State of California.

E. The Florida judgment is not *res judicata* on the issues there presented since there was lack of jurisdiction over the parties and the subject matter of the action.

F. Appellant does not have proper capacity to institute legal proceedings in the State of California in his own behalf or in behalf of the class of persons purportedly represented by him.

ARGUMENT.

A. No "Case" or "Controversy" Is Presented as Required by Article III of the United States Constitution and the District Court Lacks Jurisdiction.

Appellant has instituted suit in the United States District Court on the ground of diversity of citizenship. A Federal District Court has jurisdiction over an action based on diversity of citizenship only if there exists an actual, substantial controversy between the citizens of different states and when that does not appear, the action must be dismissed.

Engel v. Tribune Co. (1951), 189 F. 2d 176.

A "justiciable issue" to meet the requirements of Article III of the Constitution of the United States was not presented before the District Court. There was no proper "case" or "controversy" to give such Court jurisdiction in appellant's first cause of action to which appellant now confines his appeal. In such cause of action the Court was called to determine the effect to be given the judgment dated February 26, 1947, and further, as was specifically noted by Judge Westover, to determine the rights and authority to be accorded to probate proceedings in the states of Florida and California, respectively. It was dealing strictly with local probate processes and no "case" or "controversy" was thereby set for adjudication. A similar situation was noted by the Fifth Circuit in the recent case of *Heath v. Jones* (June 10, 1948), 168 F. 2d 460. (Rehearing denied July 26, 1948.) At page 462, it was stated:

> "By a long series of federal decisions it is established that generally probate matters such as the

validity of a will and the administration of a decedent's estate are so far proceedings *in rem* as not to be among the 'controversies' of which the district courts may be given jurisdiction under Article Three of the Constitution, and have been given jurisdiction under the statutes. See *Broderick's Will,* 21 Wall. 503, 22 L. Ed. 599; *Farrell v. O'Brien,* 199 U. S. 89, 25 S. Ct. 727, 50 L. Ed. 101; *Sutton v. English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. Ed. 644, as to probate of wills; and *Byers v. McAuley,* 149 U. S. 608, 13 S. Ct. 906, 37 L. Ed. 867; *Smith v. Jennings,* 5 Circ., 238 F. 151, as to general administration of estates. Particular claims to or against the estate, however, may be decided in a federal court as controversies inter partes, the probate court being bound to recognize the judgment in its administration; *Waterman v. Canal-Louisiana Bank Co.,* 215 U. S. 33, 43, 30 S. Ct. 10, 54 L. Ed. 80; *Markham v. Allen,* 326 U. S. 490, 66 S. Ct. 296, 298, 90 L. Ed. 256."

See also: *Porter v. Bennison,* 180 F. 2d 523, certiorari denied, 71 S. Ct. 47, 340 U. S. 817, 95 L. Ed. 600.

It is noteworthy and highly significant that the District Court in the instant case was not considering a particular claim presented to or against the estate. It was dealing with an ambitious attempt of Florida to channel property through the probate administration of that State rather than to permit California to pursue its regular probate administration of such property. Albeit under either system of probate administration the same heirs, legatees and devisees under the Last Will and Testament of Olof Zetterlund would ultimately receive distribution. The existence of any contest, if such may be said to exist, deals solely with the selection of probate administration to handle property, and as to whether the codicil is to be admitted. No "case" or "controversy" in the constitutional sense, is presented.

B. The District Court Was Correct in Declining to Interfere With Probate Affairs of the Respective States of Florida and California.

The ultimate problem for consideration by the District Court was the adjudication of the rights and responsibilities of two sets of executors—one appointed by the Probate Court of Florida and one appointed by the Probate Court of California. This was the salient issue for adjudication noted by Judge Harry C. Westover in his opinion. It is there authoritatively set out that each State has the right to handle probate administration and the possession of property in such State and to supervise the duties and responsibilities of its probate officers. These fundamental State rights should not be interfered with by federal courts.

Byers v. McAuley, 149 U. S. 608;
Watkins v. Eaton, 183 Fed. 384, 387;
Markham v. Allen, 325 U. S. 846, 65 S. Ct. 1402;
United States v. Swanson, 75 Fed. Supp. 118, 123.

It was within the discretion of the District Court to decline interference with the probate courts of either Florida or California, and the judgment of the Court represents a correct exercise of the Court's discretion. Basing decisions on the doctrine among others of *forum non conveniens,* Federal Courts have declined to exercise jurisdictional power of the forum when vexation or improper judicial interference would result. *Gulf Oil Corporation v. Gilbert,* 330 U. S. 501 (1947). It was there noted by Mr. Justice Jackson:

> "On substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 311 U. S. 570; *Burford v. Sun Oil Company,* 319 U. S. 315."

C. Compulsory Recognition of the Florida Judgment Would Be in Derogation of the Rights of Sovereignty of the State of California, and Would Preclude the Latter State from Effecting Orderly Probate Administration.

Probate are essentially *in rem* proceedings. They concern the administration of property then before the Court, or in the case of domiciliary probate, concern both the administration and the distribution of such property. Probate may be commenced in any and every State where property is located. The right and power to deal with such property is one of the important attributes of sovereignty. The right to protect local creditors, and the right to have probate administration conform to local law and local regulation are all inherent residual rights vested in the State.

Any attempt by a Federal Court to deprive any State of the inherent rights of probate in accordance with local law is contrary to our very constitutional scheme. The Supreme Court in its decisions has left each State free to assert its full power over local property in disregard of foreign probate judgments.

Clarke v. Clarke, 178 U. S. 186 (1900);
Blount v. Walker, 134 U. S. 607 (1890).

Where conflicting claims of domicile exist, the Supreme Court has rejected the argument that the full faith and credit clause required that the first such adjudication be respected

Riley v. New York Trust Co., 315 U. S. 343 (1942);

Overby v. Gordon, 177 U. S. 214 (1900).

In *Thormann v. Frame,* 176 U. S. 350 (1900), the reasoning for this principle was succinctly stated as follows:

> "Now a judgment *in rem* binds only the property within the control of the court which rendered it . . . as a judgment *in rem* it merely determined the right to administer the property within the jurisdiction, whether considered as directly operating on the particular things seized, or the general status of assets there situated."

Further, Chief Justice Waste noted in the case of *In re Reynolds Estate,* 217 Cal. 557, 20 P. 2d 323, 324:

> "Since the testator's domicile is the jurisdictional fact, and since the recognition which is given by other states to the law of the testator's domicile is merely a rule of conflict of laws, the decision of one state, to the effect that a testator is domiciled there, is not binding on any other state, even under the full faith and credit clause of the federal Constitution (article 4, §1); but other states in which a testator's property is situated, may determine such question, each state for itself, without reference to the decree of the state which passed upon that question first in point of time." (Citing cases.)

Clearly, therefore, the State right of sovereignty relating to probate administration should remain unhampered and without Federal interference.

Even in the great majority of State cases in which the full faith and credit clause has been an issue, the courts have asserted full dominion over local property, both real and personal in disregard of foreign decrees.

Cases:

In re Reynolds' Estate, 217 Cal. 557, 20 P. 2d 323 (1933);

Foster v. Kragh, 107 Colo. 389, 113 P. 2d 666 (1941);

Trotter v. Van Pelt, 144 Fla. 517, 198 So. 215 (1940).

D. Appellant Is Improperly Attempting Through a Federal District Court to Make Collateral Attack Upon a Valid Judgment of the State of California.

The obvious purport and effect of the order of the Florida Court dated February 26, 1947, is to divest the appellees of all personal property of the decedent held by appellees in their official capacity as Co-Executors of the estate of Olof Zetterlund under California Probate procedure. Appellant seeks thereby to give extra-territorial effect to a foreign judgment and to reach property outside the jurisdiction of the Court rendering said judgment, and event to reach property, in the constructive possession of the Probate Court of the State of California held pursuant to judgments of such Court. For failure of appellee to comply with said judgment, appellant prays appellee be declared in contempt of court. Thus, a collateral attack is made on California judgments, and probate proceedings.

The California judgments admitting the codicil and will of the decedent to probate are valid and subsisting judgments and are *res judicata* as to the issues therein presented.

If an attack is to be made upon the probate judgments of the California Court an orderly procedure therefor is set forth in Section 380 of the California Probate Code which reads as follows:

> "S. 380. Who may contest after probate: Filing of petition. When a will has been admitted to probate, any interested person, other than a party to a contest before probate and other than a person who had actual notice of such previous contest in time to have joined therein, may, at any time within six months after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that probate be revoked."

Yet, in the absence of a petition for revocation, the granting of letters testamentary is conclusive on the question of the jurisdiction of the State of California and cannot be collaterally attacked. (Section 302 of the California Probate Code.)

See also:

In re Crisler's Estate (1948), 188 P. 2d 772, 83 Cal. App. 431.

The State Courts of California would not permit Appellant to make attack upon its own proceedings. The Federal District Court sitting in such State must not therefore permit such attack.

Any attempt by appellant to make such a collateral attack under the guise of "full faith and credit" is entirely improper and without merit.

E. The Florida Judgment Is Not Res Judicata and Is Not Conclusive on the Issues There Presented Since Such Court Lacked Jurisdiction Over the Parties and Subject Matter.

Want of jurisdiction, either as to persons to the suit or as to the subject matter of the action negative the very existence of the legal obligation sought to be imposed. Such deficiency may therefore be inquired into at any time in considering the enforcement of any judgment.

Florida lacked jurisdiction over the appellee in her capacity as Co-Executor of the California proceedings. By the descriptive and subtle designation given appellee in this action as "pretending co-executor *de son tort,*" appellant attempts to sue appellee in her representative authority but is denying her authority to act. It is true appellee did not appear in the Florida proceedings in her representative capacity, though such capacity was made known to the Florida court at that time. Yet through the judgments of the Florida courts an attempt is made to reach personal property held by appellee in her official capacity. Submission to the jurisdiction of the Court by Appellee by entering a voluntary appearance does not confer jurisdiction upon such Court to render judgment against appellee in her representative capacity. (21 Am. Jur. 930.) An *"in personam"* judgment is binding only on the parties or their privies. Despite appellant's great reliance on *Sherrer v. Sherrer,* 334 U. S. 343, 92 L. Ed. 1431, full faith and credit cannot be binding upon appellee in her representative capacity. It is implicit from the very contents and character of the Florida judgment here sought to be enforced that such attempt is being made. Moreover, the property sought to be reached is in the constructive pos-

session of the California courts. As such, the Florida judgment attempts to deal with property not within the territorial limits of Florida when the judgment was entered and not rightfully before the Court irrespective of the fiction of *"mobilia sequentur personam"* or any other legal theory. The Court not having jurisdiction of the subject matter, the full faith and credit clause has no application.

Full faith and credit of the Florida judgment dated February 26, 1947, should therefore be denied.

F. Appellant Lacks Legal Capacity Individually and as a Purported Class Representative to Bring Suit in the United States District Court.

By express statute, the State of California refuses to permit a foreign executor to enforce a foreign judgment in this state unless by special authority and in an action or special proceeding. *California Code of Civil Procedure,* Section 1913, expressly provides:

> "S. 1913. Record of another state, its effect. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executive or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

This provision is binding upon the Federal Courts sitting in the State of California.

> *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 585 S. C. 404.

This Code Section above referred to received attention by this Circuit in the very recent case of *Wallan et al. v. Rankin et al.* (Mar. 11, 1949), 173 F. 2d 488, (rehearing denied April 11, 1949) at page 493, where it was noted:

> "It is, of course, the universal rule, true in California as elsewhere, that in the ordinary situation a suit by a foreign executor or administrator may not be maintained without ancillary appointment in the state of the forum. Code of Civil Procedure, §1913. The reasons for this practice are too familiar to warrant elaboration here. *Cf. Ghilian v. Couture,* 84 N. H. 48, 146 A. 395, 65 A. L. R. 553, and annotation. Whether suits such as the present constitute an exception to the rule is a question to which the California authorities give no precise answer. In at least two cases, however, the courts of that state have departed from the rule in exceptional circumstances. *Cf. In re Estate of Rawitzer,* 175 Cal. 585, 166 P. 581; *Fox v. Tay,* 89 Cal. 339, 24 P. 855, 26 P. 897, 23 Am. St. Rep. 474."

The departures from the rule referred to in the *Wallan* case bear no resemblance to the instant factual situation. Here, the District Court was not dealing with the legal capacity of a trustee to institute suit nor with a foreign judgment based upon a debt or specific claim. It was dealing with a judgment concerning the processes of administration of a probate court. Clearly, Appellant individually did not have the right to seek enforcement of that judgment nor legal capacity to commence suit in the California District Court.

Moreover, appellant cannot institute suit in the District Court as a purported class representative. There is no privity between appellant and the class of heirs, legatees, and devisees appellant purports to represent.

See:

Hansberry v. Lee (1940), 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115, 132 A. L. R. 741;

Baker v. Baker, Eccles & Co. (1917), 242 U. S. 386, 394.

Conclusion.

In the alleged cause of action to which appellant now confines his appeal no "case" or "controversy" is presented as required to meet fundamental constitutional requirements of the Federal Court. The Court therefore lacked jurisdiction to adjudicate the matter therein presented.

Even assuming there was no want of proper jurisdictional authority, the District Court properly refused to exercise its jurisdictional power, and properly refused to disturb possession of property in the custody of a State Court and properly refused to disturb the respective probate proceedings of sister States.

Appellant is merely attempting through access to the Federal Courts to collaterally attack valid judgments of the State of California, and to attack and interfere with the orderly probate proceedings of that State. Such collateral attack is improper.

In attempting to effectuate recognition of the Florida judgment dated February 26, 1947, by the United States District Court, appellant lacks legal capacity to commence such action. Moreover, the judgment sought to be so enforced should not be accorded full faith and credit in that the Florida Court lacked jurisdiction of the subject matter and over the parties against whom such judgment is sought to be enforced.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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By W. Alan Thody,
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